

Short Title: GSC Non-Trustee Power Holder Amendments.

A BILL TO BE ENTITLED

AN ACT TO AMEND THE ARTICLE ON POWER HOLDERS OF TRUSTS TO EXPAND
THE DEFINITION OF "POWER HOLDER" AND THE POWER OF A POWER HOLDER,
TO ELABORATE ON THE DUTIES AND LIABILITIES OF A POWER HOLDER AND
A TRUSTEE, AND TO PROVIDE DEFAULT RULES REGARDING LIMITATIONS OF
ACTIONS AGAINST POWER HOLDERS, DEFENSES IN ACTIONS AGAINST POWER
HOLDERS, VACANCIES IN THE OFFICE OF POWER HOLDER, AND BONDS OF
POWER HOLDERS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 36C-1-105 reads as rewritten:

"§ 36C-1-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties
and powers of a trustee and a power holder under Article 8A of this Chapter, relations among
trustees and those power holders, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

(1) The requirements for creating a trust.

(2) The duty of a trustee or a power holder under Article 8A of this Chapter to act
in good faith and in accordance with the terms and purposes of the trust and
the interests of the beneficiaries, except as otherwise provided in subsection
(c) of this ~~section~~ section and in G.S. 36C-8A-3 and G.S. 36C-8A-4 with
respect to the duty of a power holder and trustee.

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries,
and that the trust have a purpose that is lawful, not contrary to public policy,
and possible to achieve.

- (4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416.
- (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter.
- (6) The effect of an exculpatory term under G.S. 36C-10-1008, except as otherwise provided in subsection (c) of this section.
- (7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary.
- (8) Periods of limitation for commencing a judicial proceeding.
- (9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.
- (10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204.
- (11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.
- (12) The power of a trustee to renounce an interest in or power over property under G.S. 36C-8-816(32).
- (c) ~~The provisions of subdivisions~~ Subdivisions (2) and (6) of subsection (b) of this section ~~shall do not~~ apply to a power holder described in Article 8A of this Chapter with respect to powers conferred upon the power holder in a nonfiduciary capacity ~~under G.S. 36C-8A-3(a) or under the terms of the trust.~~ capacity."

SECTION 2. Article 8A of Chapter 36C of the General Statutes reads as rewritten:

"Article 8A.

"Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a Trustee With Respect to Power Holder's Actions.

"§ 36C-8A-1. Definition. "Power holder" defined.

(a) For purposes of this ~~Article~~, Article:

(1) ~~the~~ The term "power holder" means a person ~~who~~ described in subdivision (2) of this subsection that under the terms of a trust has the power to take certain actions with respect to a trust and ~~who that~~ is not a any of the following:

a. ~~trustee or a~~ A trustee.

b. A settlor with a power to direct or consent pursuant to G.S. 36C-8-808.

c. A person in which a donor creates a power of appointment.

d. A person that has authority to consent to the exercise of the power of appointment.

e. A beneficiary with a power over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by a beneficiary under G.S. 36C-3-301 through G.S. 36C-3-305 with respect to the exercise or nonexercise of the power.

(2) A power holder may be any of the following:

a. One or more individuals.

b. One or more other persons each of which is qualified to exercise trust powers in this State.

c. Any combination of the persons described in sub-subdivisions a. and b. of this subdivision.

(b) The person is a power holder whether or not the terms of the trust refer to the person as a power holder and, except as otherwise provided in sub-subdivisions (a)(1)b. and e. of this

section, whether or not the person is a beneficiary or settlor of the trust. A power holder is sometimes referred to as a "trust director."

"§ 36C-8A-2. Powers of a power holder.

(a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be required of a trustee, including, but not limited to, a power to direct or consent to the following:

- (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee ~~is authorized to~~ may take under this Chapter.
- (2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one of more trust assets, and termination of the trust by distribution of all of the trust assets.
- (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust.

(b) The terms of a trust may also confer upon the power holder any other power, including, but not limited to, the power to do the following:

- (1) Modify or amend the trust to do any of the following:
 - a. Achieve favorable tax status under applicable law.
 - b. Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.
- (2) Remove and appoint trustees and power holders.
- (3) Increase or decrease the interests of any beneficiary.
- (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a

beneficiary by the governing instrument, except that a grant or modification of a power of appointment ~~may~~shall not grant a beneficial interest to any of the following:

- a. Any individual or class of individuals not specifically provided for in the trust instrument.
- b. The person having the power to grant, modify, or terminate the power of appointment.
- c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.

(5) Change the governing law of the trust.

(c) The power holder may exercise any further power appropriate to the exercise or nonexercise of a power granted to the power holder under subsections (a) and (b) of this section.

(d) The powers granted to the power holder under this section are subject to the same provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings that are applicable to a trustee in a like position and under similar circumstances.

"§ 36C-8A-3. Duty and liability of power holder.

~~(a) A power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in good faith and in accordance with the purposes and terms of a trust and the interests of the beneficiaries, except a power holder is not a fiduciary with respect to the following:~~

~~(1) A power to remove and appoint a trustee or power holder.~~

~~(2) A power that constitutes a power of appointment held by a beneficiary of a trust.~~

~~(3) A power the exercise or nonexercise of which may affect only the interests of the power holder and no other beneficiary.~~

1 Except as otherwise provided in subsection (f) of this section, a power holder is a fiduciary
2 with respect to the exercise or nonexercise of a power and has the same duty and liability as the
3 following:

4 (1) If the power is not held jointly with the trustee or another power holder, as a
5 sole trustee in a like position and under similar circumstances.

6 (2) If the power is held jointly with the trustee or another power holder, as a
7 cotrustee in a like position and under similar circumstances.

8 ~~(b) A power holder is liable for any loss that results from breach of fiduciary duty~~
9 ~~occurring as a result of the exercise or nonexercise of the power.~~

10 ~~(c) The following provisions applicable to a trustee shall also be applicable to a power~~
11 ~~holder with respect to powers conferred upon the power holder as a fiduciary: The provisions~~
12 regarding the same duty and liability of a power holder as a trustee in a like position and under
13 similar circumstances include all of the following:

14 (1) ~~The provisions of G.S. 36C-8-814 regarding discretionary powers and tax~~
15 savings. Article 8 of this Chapter regarding the duties of a trustee.

16 (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding
17 liability of trustees and rights of third persons dealing with trustees.

18 (3) The provisions of Article 9 of this Chapter regarding the uniform prudent
19 investor rule.

20 (4) The provisions of G.S. 36C-7-703 regarding cotrustees.

21 (d) Subject to subsection (e) of this section, a power holder shall provide information to
22 a trustee or another power holder to the extent the information is reasonably related both to the
23 powers and duties of a power holder and the powers and duties of the trustee or the other power
24 holder. A trustee or other power holder that acts in reliance on information provided by the power

holder is not liable for breach of trust to the extent the breach resulted from the reliance, unless
by so acting the trustee or the other power holder engages in intentional misconduct.

(e) A power holder does not have a duty to monitor a trustee or another power holder or
inform or give advice to a settlor, beneficiary, trustee, or another power holder concerning an
instance in which the power holder might have acted differently than a trustee or another power
holder. By taking the action described in this subsection, the power holder does not assume the
duty excluded under this subsection.

(f) The terms of the trust may provide that the power holder is a nonfiduciary with respect
to the exercise or nonexercise of the power, including the power to achieve the settlor's tax
objectives under the Internal Revenue Code. Unless the terms of the trust provide otherwise, the
power to remove and appoint a trustee or power holder shall be deemed to be held in a
nonfiduciary capacity.

"§ 36C-8A-4. Duty and liability of trustee.

(a) If the terms of a trust confer upon a power holder the power to direct certain actions
of the trustee, the trustee ~~must~~ shall act in accordance with the direction and is not liable,
individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with
the ~~direction~~ direction, unless compliance with the direction constitutes intentional misconduct
on the part of the trustee.

(b) If the terms of a trust confer upon the power holder the power to consent to certain
actions of the trustee, and the power holder does not provide consent within a reasonable time
after the trustee has made a timely request for the power holder's consent, the trustee is not liable,
individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure
to take any action that required the power holder's consent.

(c) If the terms of a trust confer upon ~~the person~~ a power holder a power other than the
power to direct or to consent to the actions of the trustee, trustee described in G.S. 36C-8A-2(a),

the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.

(d) ~~The trustee has no duty to monitor the conduct of the power holder, provide advice to the power holder, or consult with the power holder. The trustee is not required to give notice to any beneficiary of any action taken or not taken by the power holder whether or not the trustee agrees with the result. Administrative actions taken by the trustee for the purpose of implementing directions of the power holder, including confirming that the directions of the power holder have been carried out, do not constitute monitoring of the power holder nor do they constitute participation in decisions within the scope of the power holder's authority. A trustee does not have a duty to monitor a power holder or inform or give advice to a settlor, beneficiary, trustee, or power holder concerning an instance in which the trustee might have acted differently from a power holder. By taking an action described in this subsection, a trustee does not assume a duty excluded by this subsection.~~

(e) Subject to subsection (d) of this section, a trustee shall provide information to a power holder to the extent the information is reasonably related both to the powers and duties of the trustee and the powers and duties of the power holder. A power holder that acts in reliance on information provided by a trustee is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the power holder engages in intentional misconduct.

"§ 36C-8A-4.1. Limitations of actions against power holder for breach of trust.

In an action against a power holder for breach of trust, the same limitations of actions apply to the power holder that apply under G.S. 36C-10-1005 to an action for breach of trust against a trustee in a like position and under similar circumstances.

"§ 36C-8A-4.2. Defenses in action against power holder.

In an action against the power holder for breach of trust, the power holder may assert the same defenses that a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee, including all of the following:

- (1) Beneficiary's consent, release, or ratification pursuant to G.S. 36C-10-1009.
- (2) Reasonable reliance on the terms of the trust pursuant to G.S. 36C-10-1006 and G.S. 36C-9-901(b).
- (3) Reasonable care in ascertaining the happening of an event affecting the administration or distribution of a trust pursuant to G.S. 36C-10-1007.

"§ 36C-8A-5. Compensation and reimbursement of expenses of power holder.

A power holder as a fiduciary is entitled to compensation and reimbursement of expenses as provided in G.S. 32-59.

"§ 36C-8A-6. Jurisdiction over power holder.

(a) By accepting appointment to serve as a power holder with respect to a trust having its principal place of business in this State, or by moving the principal place of administration to this State, the power holder submits personally to the jurisdiction of the courts of this State regarding any matter involving action or inaction of the power holder.

(b) This section does not preclude other methods of obtaining jurisdiction over a power holder.

"§ 36C-8A-7. Accepting or declining the appointment as power holder.

(a) A person designated as a power holder accepts the appointment to serve as a power holder:

- (1) By substantially complying with a method of acceptance provided in the terms of a trust; or
- (2) If the terms of a trust do not provide a method or the method provided in the terms of a trust is not expressly made exclusive, by exercising powers or

performing duties as a power holder or otherwise indicating acceptance of the appointment to serve as a power holder.

(b) A person designated as a power holder may reject the appointment to serve as a power holder. A trustee may give written notice to a power holder requesting acceptance of the appointment as power holder. A power holder who does not accept such appointment within 120 days after receipt of such notice is considered to have rejected the appointment to serve as a power holder.

"§ 36C-8A-8. Powers of trustee in the absence of a power holder. Vacancy in the office of the power holder.

(a) If a vacancy occurs in the office of the power holder because the power holder fails or ceases to act for any reason, all of the following apply:

(1) If one or more power holders remain in office, a vacancy in the office of the power holder need not be filled.

(2) If the terms of the trust provide for a successor to the power holder, the person designated by the terms of the trust or appointed under the terms of the trust shall act as the successor power holder.

(3) ~~The~~ During the time when a vacancy occurs, the trustee shall be vested with any fiduciary power or duty conferred upon a ~~the~~ power holder by the terms of a ~~the~~ trust that are described in G.S. 36C-8A-2(a) during the time when no power holder is available to exercise such power or perform such duty because of absence, illness, or other cause. G.S. 36C-8A-2(a).

(4) The court may appoint a power holder whenever the court considers the appointment necessary for the administration of the trust.

(b) A successor power holder shall succeed to all the powers and is subject to the duties and liabilities that were imposed upon the original power holder, unless a contrary intent appears from the governing instrument.

"§ 36C-8A-9. More than one power holder.

When there is more than one power holder authorized to act, and they are unable to reach a unanimous decision, they may act by majority decision. Unanimity is required when only two are authorized to act.

"§ 36C-8A-10. Resignation of power holder.

(a) A power holder may resign upon either of the following conditions:

(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all trustees.

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

"§ 36C-8A-11. Removal of power holder.

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable trust, a trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a power holder, or a power holder may be removed by the court on its own initiative.

(b) The court may remove a power holder under any of the following circumstances:

(1) The power holder has committed a serious breach of trust.

(2) Lack of cooperation with the trustee substantially impairs the administration of the trust.

(3) Because of unfitness, unwillingness, or a persistent failure of the power holder to exercise effectively the duties and powers conferred upon the power holder

the court determines that removal of the power holder best serves the interests of the beneficiaries.

(4) There has been a substantial change of circumstances, the court finds that removal of the power holder best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable successor power holder is available.

(c) Pending a final decision on a request to remove a power holder, or in lieu of or in addition to removing a power holder, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

"§ 36C-8A-12. Power holder's bond.

(a) A bond shall be required for the performance of the power holder's duty only if the terms of the trust require the power holder to provide a bond.

(b) If no bond is required, the provisions of G.S. 36C-7-702(a)(3) and (4) applicable to a trustee apply to the power holder, but in no event shall a bond be required of a power holder if the terms of the trust require otherwise.

(c) If a bond is required, the provisions of G.S. 36C-7-707(b) and (c) applicable to a trustee apply to the power holder."

SECTION 3. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

SECTION 4. This act becomes effective [October 1, 2021], and applies to trusts created [before, on, or after] that date.